IN RE ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 120

and

CEMSTONE

DECISION AND AWARD OF ARBITRATOR

BMS CASE 16-RA 0598

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August 24, 2016

IN RE ARBITRATION BETWEEN:

IBT #120,

and

Cemstone.

DECISION AND AWARD OF ARBITRATOR
BMS Case No. 16-RA-0598
Seniority grievance

APPEARANCES:

FOR THE UNION:	**FOR THE COMPANY:**
Katrina Joseph, Attorney for the Union	Phyllis Karasov, Attorney for the Company
Rich Fredrick, Union Business Agent	Tim Becken, Sr. VP of Operations
Bill Wedebrand, Sec'y Treasurer	Joel Gilles, Dispatcher
Ben Martinez, Union Steward	John Dickey, VP of Metro Operations

PRELIMINARY STATEMENT

The hearing in the matter was held on June 17, 2016 at the FMCS offices in Minneapolis, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing briefs on July 29, 2016 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated May 1, 2014 through April 30, 2015. The grievance procedure is contained at Article 2. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. The parties agreed there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE

The union stated the issue as follows: Whether the Employer violated the contract when it failed to use master seniority when calling drivers off work for inclement weather; if so, what is the appropriate remedy?

The company did not set forth a formal issue in its post hearing brief.

After a review of the evidence and the arguments of the parties the issue is determined as follows: Did the employer violate the terms of the CBA when it allowed junior drivers to work when senior drivers were called off under the unique facts of this case? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - SENIORITY

Section 1. Seniority rights shall prevail. …

Section 2. The senior employees shall have first preference on the job; provided, however that the present assignment of employees in the various classifications of work shall not be disturbed in any manner other than set forth below. …

Section 3 ***

Lakeland will have a start time bid monthly between May 1st – November 30th, of up to six truck start times. Start times will be bid for Monday – Friday; Saturday and Sunday will be off of the Master Seniority List. Afternoons will be run according to current practice. If the plant is closed for the day, the Company will revert to the Master Seniority List. Any further change will be by mutual agreement.

ARTICLE 5

Section 1

The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, including vacations now granted, and general working conditions, shall be maintained at not less than the highest minimum standards *in effect* at the time of the signing of this Agreement…

UNION'S POSITION

The union took the position that the company violated the CBA when it worked junior employees with bid start times at the Lakeland facility and senior employees from other locations were not allowed to work during 5 separate dates in 2015 when there was inclement weather. In support of this position the union made the following contentions:

1. The union cited Article 3, sections 1 and 2 and noted that both sections state that seniority shall prevail and that senior employees have first preference on the job. The union further contended that the language of the 7th paragraph of Article 3, section 3 was never intended to abrogate or change that underlying notions that seniority rights are paramount to employee rights under the contract. The union further noted that the East Side employees bid on the plants/facilities by master seniority and that this was confirmed by the Flagler award between these parties in 2008.

2. The union further asserted that even though there is no specific provision dealing with rain or weather delays, the east side drivers are called off work by their master seniority. Nothing in the negotiations for the new language in paragraph 7 changed that. The union cited a prior decision between these parties, *IBT 120 and Cemstone*, BMS # 08-RA-0014 (Flagler 2008) in which the arbitrator ruled in the union's favor and held that master seniority prevailed on the east side.

3. The union noted too that under the prior agreement, drivers would report for duty at one of the St. Paul facilities, covered by the east side agreement, load their trucks and deliver product. The union also noted that the company wanted plant bidding, as is the case on the west side, for the Lakeland plant but that this was firmly and unequivocally rejected by the union negotiators for the successor labor agreement.

4. The union also noted that there was eventually a tentative agreement whereby the company was to have 10 start times at Lakeland but that this proposal was rejected by the union membership and the parties returned to the bargaining table. What they agreed to and was eventually ratified by the union membership, allowed the company to have 6 start times bid at Lakeland and that any further changes would be by mutual agreement. The union asserted that the union negotiators assumed that the current practice regarding rain out days would remain in place requiring that senior drivers would be dispatched to Lakeland if other locations were rained out and that junior drivers would be sent home.

5. The union also noted that after the current contract was signed there have been instances where the company violated the terms of Article 3 paragraph 7 and called off the incorrect employees due to bad weather. These were grieved by the union and the company eventually paid the affected employees. See Union exhibit 8 and 9, showing an e-mail chain whereby the company acknowledged the violation and paid lost wages to several members.

6. The union further asserted that there were discussions about calling off improperly people at Lakeland and that the company has acknowledged their responsibility to call off junior people when bad weather strikes and use senior drivers based on the east side master seniority list.

7. The union maintained that the contract language at issue was clear and unambiguous and requires that except for the 6 agreed upon start time bids at Lakeland the company must abide by the master seniority list for east side employees. Calling off senior employees and using junior drivers on the dates in question here violated that fundamental term. The union argued that Article 3 requires that employees must be called off by master seniority.

8. The union asserted that the term "start time" as used in the operative language is clear and was not intended to convey a plant bid, as the company seems to want, but was unsuccessful in negotiating. The union asserted that the start time language gave junior drivers the opportunity to start at an earlier time at Lakeland than more senior drivers at other St. Paul facilities but did not affect the other clearly stated seniority rights in the agreement. Junior employees may not therefore be allowed to continue working when senior drivers have been called off.

9. The union further asserted that even though junior employees working at Lakeland have a right to begin at a specific time that bid start time did not abrogate the rights of senior employees. Junior employees do not have the right to work while senior drivers are called off. That was never the agreement nor was that ever stated as the meaning attached to the new language at issue here. The union argued that the company is now asking the arbitrator to not only attach an unusual meaning to the term "start time" but also to grant the company something it was unable to achieve in bargaining.

10. The union posited an alternate theory even if the term "start time" is determined to be ambiguous and argued that the other terms of the contract are clear and require the use of master seniority. The fact that the parties negotiated this specific term in the agreement demonstrates the intent that junior drivers were never intended to work when senior drivers were not.

11. The union asserted that if the company had wanted a plant bid whereby junior drivers could not be bumped or called off, in the event of inclement weather, the company had the obligation to bargain that with the union – not attempt to unilaterally implement such a change without negotiation.

12. The bargaining history further supports the union's position here in that the company has proposed plant seniority several times, including in the most recent round of bargaining but was unable to gain that. The union asserted that it is now simply trying to force that by calling off senior drivers in favor of junior drivers and is making very similar efficiency arguments that it made before Arbitrator Flagler in his 2008 decision on almost the same issue. He ruled in favor of the union in that case and the union asserted that even though some language has changed, the change did not abrogate the seniority provisions that remain throughout Article 3.

13. The union acknowledged that the company wanted greater efficiency at Lakeland and that it proposed plant seniority there during bargaining for the current agreement. The union rejected that, as it has in the past, and as a compromise, agreed to allow 6 drivers to bid for start times at Lakeland so that on a normal day, those 6 could report directly to Lakeland and not have to report to other St. Paul facilities and then spend time driving to Lakeland to pick up their loads.

14. The union asserted that this was the only change in the contract however, and union witnesses indicated that it was understood that this would not change the master seniority language. The union argued that they believed that both sides understood this but that if the company was somehow confused, arbitral precedent supports the view that the seniority language must still apply even if the company did not fully understand the implications of what it had agreed to as applied in a particular scenario. The union maintained most adamantly that there was no agreement to change the seniority procedure in the event of a rain out day. The union asserted that senior still applies in those situations and requires that junior drivers be called off first instead of more senior drivers, irrespective of where those senior drivers have to come from to get to Lakeland.

15. The union asserted too that the company did not use master seniority when it called off the affected employees on the dates in question and this allowed junior drivers to work even though senior drivers were called off at other St. Paul locations.

16. The union also asserted that the longstanding and well-accepted past practice also supports their position. Even through the language changed in the current agreement as set forth above, the union asserted that this change did not affect master seniority. Neither did it specifically address the situations at play here where rain caused cancellations of jobs and drivers were called off.

17. The practice here has been to call off drivers by seniority when inclement weather strikes. The union asserted that this practice met all of the traditionally recognized elements for a binding past practice and that nothing has changed, including the contract language, to alter that.

18. Further, the union pointed to the language of Article 5, the Maintenance of Standards provision and argued that there was no clear change to the master seniority list and that under that clause, if nothing else, the longstanding agreements regarding master seniority prevail.

19. The essence of the union's argument is thus that the use of master seniority on the east side continued after the signing of the current labor agreement and that new language in Article 3 neither changed nor abrogated that seniority language. Further, that there was clear evidence that the company called off senior drivers from other locations on the east side and allowed junior drivers to work in clear violation of that seniority language and longstanding past practice.

The union seeks an award sustaining the grievance, ordering the company to cease and desist and to make all affected employees whole for all lost pay and accrued benefits.

COMPANY'S POSITION:

The company took the position that there was no contractual violation in this case and that the new language found in Article 3 allowed the company to send the junior drivers who had bid the start times at Lakeland instead of waiting for senior drivers to arrive from other locations. In support of this the company made the following contentions:

1. The company outlined their business model and asserted that concrete is a very time sensitive product that will literally "go bad" if it sits in the truck for too long. They must therefore have the flexibility and the ability to deliver product in a timely fashion. That means reducing down time or deadheading time for their drivers and vehicle in order to meet customer needs. The company also outlined the process of dispatching trucks and its reliance on efficiency despite changing weather, customer need and factors in the construction business that are beyond the company's control.

2. The company has sought for years to have plant bidding at Lakeland due to the location and the uniqueness of the products manufactured there. The company asserted that the union was well aware of this and further that it understood what was intended in the new language calling for 6 start times at Lakeland as set forth in Article 3. The 6 start time bidding process began in 2014 immediately after the ratification and signing of the new CBA in this matter.

3. The company also argued that the new language is clear and unambiguous, as was the stated intent of that language during the negotiation of the new contract and that the union's position now is contrary to both.

4. The company also described the nature of the business regarding their drivers, who typically wish to end their day as soon as possible even though they do not work a set schedule.

5. The company described the history of the negotiations for the current labor agreement and noted that it proposed plant bidding at Lakeland on several occasions and in prior negotiations. The union was thus aware of what the company wanted and why and should certainly have known what the 6 start time bid language was intended to accomplish – i.e. that those drivers would have set start times and that even on rain out days, those drivers would work even though more senior drivers from other St. Paul east side locations would be called off.

6. The company also acknowledged the Flagler decision referenced above from 2008 in which the arbitrator ruled against the company when it attempted to institute start times at Lakeland. There was no language similar to that which is found in the current agreement in the one before Arbitrator Flagler. There is now however and that language allows the company the flexibility to use the drivers who bid for start times at Lakeland even when inclement weather causes cancellations of jobs and there are more senior drivers at other facilities.

7. Due to that decision, the company made it known that getting separate bid start times at Lakeland was a high priority in order to reduce down time and increase efficiency. The company also noted that the cement made at Lakeland would be used for a new bridge in Stillwater, Minnesota and that this required early start times. It was in this context that the parties were negotiating for the very language at issue now.

8. Initially the company proposed monthly bids at Lakeland. See Company exhibit 2. Eventually the parties compromised at 6 bid start times and the company asserted that everyone at the bargaining table understood what that meant – that there would be 6 bid start times at Lakeland. The company witnesses indicated that there was general agreement of the need to have these 6 start times and a general agreement as to what it meant and why the company needed the language.

9. The company explained too that the referenced to "master seniority" in the disputed language is there because not all assignments run off of the master seniority list. They also explained that Saturday and Sunday bids would run off master seniority. Current practice also encompasses more than master seniority and the company needs to take account of customer needs. That cannot always be done by seniority; it must be done by driver availability at times. Use of master seniority on rain out days is unworkable and highly inefficient and would force the company to use senior drivers even though they may have to drive long distances to get to Lakeland even though junior drivers who had bid on start times at Lakeland would be sent home.

10. The company disputed the union's claim that despite the new language, allowing for start times to be bid on a monthly basis, master seniority must still be used on rain out days and noted that significant concessions were granted in exchange for this language. The union is now seeking to renege on those good faith negotiations and seeks an interpretation of the language that renders it meaningless. The company further characterized this entire case as simply a small group of employees who are still not satisfied with the negotiated and agreed language and who still seek to change it.

11. The company outlined the difficulty dealing with inclement weather, even where it is predicted in advance. The weather may change; the weather may be bad in one location but not bad enough to warrant cancellation of loads in another. Some customers may cancel or delay a load in anticipation of bad weather while others may not. Dispatching drivers under these conditions is a daunting task and the company needs the ability to know who is available and where they will be in order to get the loads out efficiently.

12. Turning to the five dates in question, the company noted that there is no dispute that none of the grievants were scheduled to work at Lakeland and asserted that they had no contractual right to start work at Lakeland due to the inclement weather.

13. On May 14, 2015 three grievants, Messrs. Duggan, Moncur and Remackle, were not scheduled to work at Lakeland and were called off due to rain. However, most of the drivers who had bid Lakeland start times did not work either. The company noted that only one of the 6 drivers, Mr. Colbert, who bid start times at Lakeland actually worked that day. It was not possible to call him off though since he had started before 6:00 a.m. It would thus have been impossible to call him off because the dispatcher had not even called off the three grievants on that day. The remainder of the six Lakeland drivers did not work even though one was paid the contractually mandated 5 hours and the other was paid two hours of "show up pay" since they were not called off in time.

14. On May 18, 2015, the five grievants, Mathison, Frisco, Buckley, Rauch and Brom, were not scheduled to start at Lakeland. Some of the Lakeland drivers, i.e. those who had bid on start times there, did work that day even though many did not start work until mid-morning due to the weather. See Employer exhibits 4 and 8. Mr. Buckley actually did work that day and Mr. Frisco and Mathison did not work due to their request not to work. Thus, there should be no back pay awarded even if the arbitrator agrees with the union's position on the contractual language because of these facts.

15. On September 24, 2015, Mathison and Frisco were called off. Here though, several of the drivers who did work at Lakeland had in fact bid start times there and were more senior to those grievants. Under these circumstances, the company asserted that there was no contractual violation at all and could not be due to the seniority of those employees who did work.

16. On November 12, 2015, there was a similar situation in that the one grievant, Mr. Brom was junior to all of the Lakeland drivers except for one. The company again asserted though that there was no contractual right to allow Mr. Brom to work in favor of a junior driver since Brom had never bid a start time at Lakeland.

17. Lastly, November 16, 2015 Mr. Mathison and Mr. Frisco were again called off. The company noted that both were scheduled to start at noon but were called off earlier than that. The Lakeland drivers who did work were scheduled to start work much earlier than noon and simply began work at their bid start times and were finished shortly after noon. The company asserted throughout this discussion though that the main reason the grievants, some of whom were senior to Lakeland drivers and some of whom were not, was that they had not bid start times at Lakeland and had no right to work under these circumstances.

18. The company asserted that the language is clear on its face and allows the company to utilize the drivers who bid start time at Lakeland even where other senior drivers are called off due to weather. The company asserted that the union seeks to add language that is not there.

19. Further, the intent of the language as was made clear during bargaining was that the company needed separate bid times at Lakeland that would reduce the amount of driver time, or deadheading, to Lakeland by drivers who typically reported to other locations. The company asserted that the union understood what was intended by this language and acknowledged that both in negotiations and at the hearing. The language does not refer to rain as at all and thus must be interpreted per its terms – which allows for 6 start times bid at Lakeland. The company asserted that the intent of the language was clear and that on other days, no one disputes that the start times are scheduled by those 6 drivers who bid them – there is nothing in the language that calls for a different interpretation on rainy days.

20. The company argued too that the interpretation now sought by the union is not only inconsistent with its terms but leads to a result that is absurd and would negate the very purpose for inserting it in the labor agreement. It was clear to all concerned what the company wanted with this language and that it paid concessions for getting it. To read it the way the union seeks now will, in the company's eyes, grant a benefit the union knowingly and willingly gave away and render the section meaningless. The company cited arbitral authority for the proposition that contractual language must mean something and that any interpretation that would render it null, especially in these circumstances, must be rejected.

21. The company also argued that the claim by the union that the company settled various other claimed violations of this provision failed due to lack of proof. The union provided no details for what the alleged violation was, whether those instances were at all like or similar to these or why the company would settle grievances identical to these yet dispute them now. Neither was there adequate evidence that the e-mails in union exhibit 8 pertained to Lakeland start times nor any explanation for why the union never grieved the start times on good weather days but now seeks to change the rules for rainy days.

22. The essence of the company's case is that there was a clear understanding of what the new language meant and how it would apply and why. The union's interpretation would effectively render that new language, which must mean something, virtually meaningless and force the company back into the situation, ruled on by Arbitrator Flagler or greater inefficiency and wasting of time deadheading. The language was designed to rectify that very scenario and must be given effect now.

The company seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

Despite a vast difference of opinion in the meaning and proper interpretation of the operative language, there was little dispute about the operative facts of the case. The company operates a number of concrete manufacturing facilities around the Twin Cities. There was no dispute that on the Minneapolis side of the operation, known as west side, with plants in Minneapolis and Burnsville, there is plant seniority. That is not at issue in this case.

The east side, covering the St. Paul side of the operation there are several plants as well. Lakeland is near the Minnesota River and is clearly the most remote of the plants in comparison to the other locations maintained by the company. There was further no dispute that the product is perishable in that once the mix if made it cannot stay in the trucks for more than 60-90 minutes. It must be delivered on time in order to meet customer specifications. There was also clear evidence that the nature of the business is variable to say the least. Weather, traffic issues, construction delays of all sorts and changes by the customer in the type or amount of product needed creates difficulty in getting the proper product to the proper place at the proper time. The parties clearly know this though as it was clear that they have a long history with each other.[1]

[1] Arbitrator Flagler noted in his decision discussed herein that the parties have a relationship going back as far as 1936.

Part of that history was summed up in *IBT 120 and Cemstone*, BMS # 08-RA-0014 (Flagler 2008). There Arbitrator Flagler noted, and the evidence showed here as well that the company does not dispatch drivers from all of its plants. This sometimes requires that drivers report to one location and drive to another to pick up and deliver product. There was evidence that Lakeland is somewhat unique not only due to its location but also due to the product that is made there.

In the matter before Arbitrator Flagler, the company was shown to have attempted to bid job positions on the east side as it was doing on the west side, despite the difference in contractual language between the two separate "sides" of the employer's operation. He ruled against the company largely on the basis that there was no contractual language allowing a deviation from the general provision that "seniority shall prevail" and that "senior employees shall have first preference on the job." In what he described as dicta however, he acknowledged the employer's position with regard to the efficiencies to be gained from plant seniority and admonished the parties to return to the bargaining table to "reconsider their economic positions." Slip op at page 17.

When the parties did return to the bargaining table it was clear that the employer sought plant bidding at Lakeland. In several of the early proposals the company proposed exactly that and the evidence showed that company negotiators made it clear to the union that they wanted that for Lakeland.

Eventually the parties compromised and agreed to have 10 start times bid at Lakeland and reached a TA on that point, along with other matters that were on the table. That was rejected by the union membership and the parties returned to the negotiations. Eventually they reached a second compromise which was ratified and was eventually placed in the labor agreement as set forth above.

The company began the six bid times process immediately upon the effective date of the new/current agreement. The evidence did not reveal any issues with having six drivers start at Lakeland nor was there evidence of grievances filed over having those six individuals start on days when there were no rain outs.

The evidence showed here though that on five days in 2015 between May 1 and November 16, 2015, i.e. May 14, May 18, September 24, November 12 and November 16, 2015, there was inclement weather resulting in some drivers being called off.

As the company outlined, some drivers at Lakeland were allowed to work when more senior drivers who would normally have reported to other locations and did not bid start times at Lakeland were called off. The grievances were filed over the five days in question asserting that seniority should have governed in these unique circumstances and that the junior drivers at Lakeland should have been called off and sent home and that senior drivers should have been allowed to work.

There were few if any disputes about the underlying facts regarding the days in question or that on those days the drivers at Lakeland were allowed to work, at least as the company outlined it above. It was noted that not all of the drivers at Lakeland were used on all of those days but it was clear that there were drivers who had more seniority on the east side who were sent home even though some Lakeland drivers were allowed to work on the days in question. The evidence showed that the issue really involved the more general question of whether the disputed contract language required the company to call off junior drivers at Lakeland, even those who had bid one of the six bid start times per the language of Article 3, and utilize more senior drivers even though they would have had to deadhead to Lakeland in order to deliver product on those days.

The grievances were appropriately filed and the parties agreed that there were no procedural arbitrability issues. It is against that general factual backdrop that the matter proceeds.

THE CONTRACT LANGUAGE

The analysis was somewhat complicated in that both parties indicated that the disputed language of Article 3 was "clear and unambiguous" yet both interpretations supported their own, diametrically opposed positions. This left the arbitrator in the somewhat precarious position of trying to divine what the contract language actually meant even though the language did not clearly cover the situation at hand.

On this record, the disputed language was not completely clear or unambiguous. In fact, the language is silent with respect to the specific issue here; i.e. where drivers are called off due to inclement weather. The union argued that the "start time" language means only that and allowed junior drivers to select their own start times. If the union's interpretation is adopted the language would mean only that junior drivers at Lakeland have the right to start earlier, and thus work more hours, than more senior drivers at different St. Paul facilities. The language would not affect the other relevant seniority rights that the contract provides: if a junior employee is working on a given day, so must the senior employee

The employer argued that the disputed language was clear and unambiguous as well but never completely clarified what the term meant on its face. See, Company Brief at page 17. The other prong of the company's argument is that it was clear to all concerned in the negotiations for the current CBA what the company wanted and why and that while the language itself is silent on the question of what happens with the six bid drivers at Lakeland, it was clear to the union during bargaining that the bid start times language meant that those drivers start at Lakeland irrespective of their seniority. It was in effect an exception to the more general seniority language found in the remainder of the contract.

One thing that is apparent is that the second sentence in the disputed language is that start times are bid for Monday through Friday but that master seniority will be used on Saturday and Sunday. This implies that there is a negotiated substantive difference between the Monday -Friday bids that is an exception to the more general rule regarding master seniority. This reading of the language as a whole supported the company's position in this matter.

However, neither party's interpretation jumps off the page as completely clear and unambiguous; there remains some doubt as to what the parties intended when they negotiated this language. Therefore, resort must be had to bargaining history and the discussions regarding the insertion of this language in the CBA as well as the underlying purpose of the language and why the parties agreed to it in the first place.

BARGAINING HISTORY OF THIS PROVISION

Where language is not immediately clear both bargaining history and the context in which the language was negotiated is appropriate. Here before getting to the negotiations, it was important to recognize the 2008 Flagler decision which in this particular case set the stage for the negotiations for the current contract. Arbitrator Flagler ruled in favor of the union where the company simply attempted to implement plant bidding at Lakeland. He found that there was no language allowing that and that the more general seniority clauses found in the agreement applied. He also strongly suggested to the parties, in what even he termed "dicta" to return to the bargaining table and insert language that would give the employer the right to "install plant seniority at the Lakeland facility."

This is precisely what the company attempted to do during the negotiations for the current CBA. The company first proposed language as follows: "Lakeland will be bid monthly." That was rejected by the union. The evidence showed that this language was proposed several times by the company and rejected throughout the bargaining in June and July 2014. See Company exhibit 2.

Finally, there was a tentative agreement as follows: "Lakeland will have a start time bid monthly. With a current limit of 10 trucks." That was rejected by a vote of the union membership and the parties returned and negotiated the current language found in paragraph 7 of Article 3 set forth above. Significantly, that language reads as follows: "Lakeland will have a start time bid monthly between May 1st – November 30th, of up to six truck start times. Start times will be bid for Monday – Friday; Saturday and Sunday will be off of the Master Seniority List."

The evidence on this record showed that during negotiations, the company indicated that the start time bid language would allow employees to work right away – i.e. it would set a start time for 6 drivers there. This would have eliminated the deadheading issue by requiring that drivers report to other locations, get their trucks and then head to Lakeland. It would allow them to start their day at Lakeland and get going on the day's deliveries faster and more efficiently.

The evidence showed that this was conveyed to the union regarding the company's understanding of the meaning and intent of the new language as well. There was evidence that when the company's proposal was explained to the union negotiators there was a statement to the effect that it would work out "fine," indicating understanding and a tacit assent to the language and what it would mean.

Moreover, the language itself discusses only start times and is silent on rain out days, other than that if the plant is closed for a day, the company will "revert to the Master Seniority List." Here though the plant was not closed for the day; only some loads were cancelled.

Elkouri provides some guidance in situations such as this. On the one hand, clauses that are proposed but rejected are presumed not to have made it into the contract. "If a party attempts but fails, in contract negotiations, to include a specific provision in the agreement, arbitrators will hesitate to read such provision into the agreement through the process of interpretation." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed BNA Books at page 454. This of course is the well-worn arbitral theory that one cannot obtain through arbitration what was not gained through negotiation.

Here though while the company did not get its initial proposal by getting what appeared to be an across the board plant bidding as it apparently is on the west side in Minneapolis and its suburbs, the company did get the language found in Article 3 set forth above. This was a compromise reached through the collective bargaining process. The evidence showed that the parties understood that while there would not be plant wide bid start times for Lakeland drivers, there would be six such times there.

Moreover, Elkouri notes as follows: "A party's unsuccessful attempt to obtain a clause severely restricting the other party does not compel the conclusion that a more limited restriction did not inhere in the contract." Id at 455. While that statement does not apply strictly here, the point was well taken that while the company did not get everything it wanted, it certainly got something and the record supported that the company got what it asserted it did in this case.

It was also clear that both parties understood what the company wanted at Lakeland and why it needed it and that there was a clear intent to have bid start times at Lakeland to avoid the very deadheading issue that would arise if the union's interpretation of the language prevails.

Here the evidence showed that on the days in question, the drivers who had bid for Lakeland were used instead of calling drivers from other East Side locations to deadhead to Lakeland and pick up their loads. It was clear on this record that that scenario was almost precisely what the company had sought to avoid by inserting the bid language into the CBA given the distance to the Lakeland facility and the occasionally specialized nature of the product made there.

The evidence on this record showed that during negotiations, the company indicated that the start time bid language would allow employees to work right away – i.e. it would set a start time for 6 drivers there. This would have eliminated the deadheading issue by requiring that drivers report to other locations, get their trucks and then head to Lakeland. It would allow them to start their day at Lakeland and get going on the day's deliveries faster and more efficiently.

PAST PRACTICE

The union also noted that there were prior instances where junior drivers were employed and senior drivers were called off and that the company acknowledged a violation of the agreement and paid the affected drivers. See Union Exhibit 8. There was insufficient evidence to establish a binding past practice based on the evidence on this record. A past practice to be a binding part of the labor agreement generally has to contain several essential factors.

Elkouri notes that "many arbitrators have recognized that 'in the absence of a written agreement, past practice, to be binding on both parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri 6th Ed at page 608.

The Minnesota Supreme Court in affirming an arbitration where a past practice was used to interpret contract language held that a practice can be used to interpret contractual language. *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear contract language. The arbitrator ruled in favor of the employees because the practice, even though different from the agreement, met the tests for a binding past practice.

In affirming the arbitrator's award, the Supreme Court held "past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard Ed. 1961). The essential feature of any award however, whether derived from reliance on past practice or not, is whether it 'draws its essence from the labor agreement.'" See, 709 N.W.2d at 790-91.

Here while it was clear that some drivers were paid for something it was not clear that the essential elements necessary to establish a binding past practice were present or that there was an understanding that there was still a requirement to use senior driver under these unique circumstances. It was not clear what the underlying circumstances were that gave rise to the payments or whether the other elements for a binding past practice were present sufficient to establish a practice that was different from the language at issue in this case.

On this record, the evidence showed that the intent of the language in the context in which it was negotiated gave the company the right to use the six drivers with bid start times at Lakeland instead of calling in more senior drivers to work on these particular days. It should be noted though that this result is limited to these facts.

AWARD

The grievance is DENIED.

Dated: August 24, 2016

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Jeffrey W. Jacobs, arbitrator